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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Terrance and Yvonne Cornelis, Plaintiffs, vs. B&J Smith Associates, Limited Partnership, an Arizona limited partnership; B&J Smith Investments, Inc., an Arizona Corporation; Barry M. Smith; Lynette B. Walbom; and Julia P. Smith, Defendants.	Case Number: 2:13-cv-00645-BSB DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT (Oral Argument Requested)

Pursuant to Rule 12(b)(6), Fed. R. Civ. P., Defendants B&J Smith Associates, Limited Partnership, an Arizona limited partnership; B&J Smith Investments, Inc., an Arizona Corporation; Barry M. Smith, Julia P. Smith, and Lynette B. Walbom (collectively, the "Defendants") move to dismiss the Second Amended Complaint filed on February 18, 2014 (the "Plaintiffs' Second Amended Complaint"), by Plaintiffs

Terrance J. Cornelis and Yvonne Cornelis (collectively, the "Plaintiffs"). The Plaintiffs' Second Amended Complaint fails to state any cognizable claim upon which relief can be granted. The grounds for this motion are more fully set forth in the accompanying memorandum of points and authorities.

Respectfully submitted March 11, 2014.

Goodman Law PLLC

By */s/ Jeremy M. Goodman—025859*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Procedural Background

Plaintiffs filed their original complaint on April 1, 2013 (the "Original Complaint"). (Doc. 1.) Defendants subsequently filed a motion to dismiss for failure to state a claim on May 15, 2013 (the "First Motion to Dismiss"). (Doc. 10.) On May 24, 2013, exercising their right under Rule 15(a)(1), Plaintiffs filed an amended complaint as a matter of course (the "First Amended Complaint"). (Doc. 15.) The Court dismissed Defendants' First Motion to Dismiss as moot because Plaintiffs' First Amended Complaint nullified any previous complaint; and therefore, nullified any motion pertaining to that complaint. (Doc. 18.)

On July 13, 2013, Defendants filed a motion to dismiss the First Amended Complaint for failure to state a claim upon which relief can be granted (the "Second

Motion to Dismiss"). (Doc. 19.) Plaintiffs then attempted to file another amended complaint as a matter of course on July 29, 2013 so as to defeat the Second Motion to Dismiss by mootness. (Doc. 22-23.) The Court ordered the Clerk to strike said complaint because Plaintiffs did not move under Rule 15(a)(2) for leave from the Court. (Doc. 22-23.) On August 9, 2013, Plaintiffs filed a motion for leave to amend the First Amended Complaint. (Doc. 26.) In a December 20, 2013 order, the Court granted in part and denied in part Plaintiffs' motion to amend; and therefore, denied Defendants' Second Motion to Dismiss as moot (the "Order Granting Leave to Amend"). (Doc. 31.)

In the Order Granting Leave to Amend, the Court meticulously instructed the Plaintiff how to make multiple changes to the proposed amended complaint because, as written, it was futile and failed to state a claim. The Court explained in great detail and eloquence exactly what the Plaintiff needed to do to properly amend the complaint.

Plaintiffs' Second Amended Complaint was filed on February 18, 2014. (Doc. 32.) The Plaintiffs' Second Amended Complaint almost entirely ignored the Court's careful instructions in the Order Granting Leave to Amend.

II. Factual Background

Plaintiffs entered into a franchise agreement with Eatza Pizza, Inc. Pls.' 2nd Am. Compl. 10. Plaintiffs previously filed suit against Eatza Pizza, Inc. on April 24, 2009, claiming that Eatza Pizza, Inc. committed fraud against the Plaintiffs and claiming that Eatza Pizza, Inc. violated various laws intended to protect Plaintiffs. Pls.' 2nd Am. Compl. 34. That former lawsuit was resolved by default judgment against Eatza Pizza, Inc., and in favor of the Plaintiffs. Pls.' 2nd Am. Compl. 37. Now, over

three years later, Plaintiffs have chosen to sue these Defendants regarding the exact same set of circumstances and alleging identical and/or nearly identical causes of action.

The Court should dismiss the Plaintiffs' Second Amended Complaint. The Defendants deny each and every one of the allegations of wrongdoing in the Plaintiffs' Second Amended Complaint. However, even assuming, *arguendo*, that the claims were true, the Plaintiffs' Second Amended Complaint still does not state any cognizable claims upon which relief can be granted. In every instance, the claims asserted by Plaintiffs are those to which no private right of action exists and/or are time barred by the applicable statute of limitations. Further, the Plaintiffs rest their claims on rote conclusions and stock generalizations—ignoring entirely the fundamental requirement in matters of alter ego that they plead specific facts showing that they have plausible claims for relief.

III. Standard of Review

Rule 12(b)(6) requires Plaintiffs to allege facts which, if true, would provide adequate grounds for relief; "formulaic recitation of the elements of a cause of action" will not suffice. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs must "at a minimum, set forth factual allegations sufficient 'to raise a right to relief above the speculative level.'" *Fitzgerald v. Infinia Healthcare, Inc.*, No. 2:08-cv-00015-PHX-JAT, 2008 WL 1808503, at *1 (D. Ariz. April 21, 2008)(Teilborg, J.)(citation omitted). This means a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face, not just conceivable." *Boustila v. Scottsdale Unified Sch. Dist. No. 48*, 2:08-cv-00677-PHX-JAT, 2008 WL 5134694, at *2 (D. Ariz. Dec. 5,

2008)(Teilborg, J.)(citation omitted). "[U]nreasonable inferences" and "conclusory legal allegations" cannot be accepted. *Isenberg v. ETS Servs., LLC*, 589 F. Supp. 2d 1193, 1198 (C.D. Cal. 2008).

IV. Argument

As previous mentioned, in the Order Granting Leave to Amend, the Court laid out detailed instructions for the Plaintiffs to follow in order to cure the deficiencies of its proposed amended complaint. The Court stated that "Plaintiffs' amended pleading must cure the deficiencies identified in this Order." (Doc. 32 p. 8:1-2.) In order to cure the deficiencies the Court stated that the proposed complaint must be amended to:

1. Cure the deficiency as to the statute of limitations;
2. State a claim for breach of contract, based on alter ego liability against the Business Entity Defendants; and
3. State a claim for breach of contract, based on alter ego liability against the Individual Defendants.

With regards to 1 above, the Court demanded that the Plaintiffs "identify the conduct that constituted the alleged breach of Franchise Agreement, the date on which that conduct occurred, or the date on which they discovered, through the exercise of due diligence, that such conduct had occurred." (Doc. 32 pp. 10:26 - 11:2.) With regards to 2 and 3 above, the Court demanded specific facts supporting the application of the alter ego doctrine. The Plaintiffs failed to follow all of the Court's instructions; and thus, this motion to dismiss should be granted. Additionally, the Plaintiffs' Second Amended Complaint fails to state a claim upon which relief can be granted because it incorporates

by reference exhibits, but there are no exhibits attached. Finally, the Court should not permit the Plaintiffs any opportunities to cure pleading deficiencies because numerous and detail filled opportunities have already been granted.

A. Plaintiffs fail to cure the deficiency as to the statute of limitations by failing to allege a date on which the conduct occurred, or the date on which the conduct was discovered.

Defendants have asserted and continue to assert that Plaintiffs fail to state a claim upon which relief can be granted because their claims violate the statute of limitations. The Court agreed with Defendants and, as mentioned above, gave the Plaintiffs the opportunity to cure the deficiency. Plaintiffs wasted this opportunity and still do not state when the conduct that gave rise to action occurred or, alternatively, when the conduct giving rise to the action was discovered. The Court specifically instructed the Plaintiffs to resolve this deficiency and they have not. As such, the Plaintiffs' right to relief is not raised "above the speculative level"; and therefore, the motion to dismiss should be granted. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

B. Plaintiffs fail to set forth specific facts that would be sufficient to state a claim for breach of contract, based on alter ego liability against the Business Entity Defendants or the Individual Defendants.

The Court correctly pointed out in the Order Granting Leave to Amend that Plaintiffs needed to assert specific facts supporting the application of the theory of alter ego. The Court also stated that conclusory statements were insufficient and that isolated occurrences of the alter ego factors is not enough to justify an alter ego theory.

Defendants' review of the Plaintiffs' Second Amended Complaint has revealed no specific facts, by which breach of contract could be asserted and maintained, based

on alter ego. The Plaintiffs continue to, as they had done in the Original Complaint, the First Amended Complaint, and the Proposed Second Amended Complaint, make conclusory statements that do not satisfy Rule 8(a)'s standard. Stating that Defendants "systematically abused the corporate privilege," or that Defendants "have misused their absolute control," or that certain Defendants have been involved in previous civil litigation amounts to mere conclusory statements and not specific facts—and at best are nothing more than isolated incidents of the alter ego factors.

Plaintiffs argues essentially that because the officers and directors controlled the corporation, and allegedly received some personal benefits (an accusation disputed by the Defendants), they are therefore necessarily the alter ego of the corporation. This would mean, if the Court accepted this argument, that EVERY officer and director of EVERY corporation would be the alter ego of the corporation. This is not the law.

The Plaintiffs fail to assert sufficient specific facts giving rise to a claim of breach of contract, based on alter ego, by showing that the Defendants were the alter ego of the corporation. Rather, they have shown a few instances of alter ego factors present in almost every corporation.

The Court should grant this motion to dismiss.

C. The Plaintiffs' Second Amended Complaint makes allegations based on exhibits, but no exhibits are attached thereto.

Furthermore, Plaintiffs make allegations and incorporate by reference exhibits that allegedly support those allegations. However, there are no exhibits attached to the Plaintiffs' Second Amended Complaint. Perhaps Plaintiffs assume that the previous

inclusion of certain exhibits in other pleadings is sufficient. However, as the Court pointed out in its July 12, 2013 order:

> Upon filing, an amended complaint supersedes the original complaint in its entirety. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir.1997) ("[T]he amended complaint supersedes the original, the latter being treated thereafter as non-existent.") (quotation omitted). After amendment, the original complaint is considered non-existent. *Ferdik v. Bonzalet*, 963 F.2d 1258, 1262 (9th Cir. 1992).

(Doc. 18 p. 2:9-13.)

Thus, the Court should grant Defendants' motion to dismiss because Plaintiffs relay heavily on "non-existent" assertions of fact as there are no exhibits attached.

D. The Court should not grant Plaintiffs another opportunity to amend its deficient pleading.

The Court cited in its Order Granting Leave to Amend the case of *Foman v. Davis*, 371 U.S. 178 (1962), stating that "futility" is a reason that a court in its discretion should not permit an amended complaint. (Doc. 32 p. 4:1-2.) The *Foman* Court also listed a number of other reasons for which an amended complaint should not be permitted. Among those is a "repeated failure to cure deficiencies by amendments previously allowed . . . ." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In *Foman*, the movant had only amended one time. The Court made a point of citing Rule 1, stating, "The Rules themselves provide that they are to be construed "to secure the just, speedy, and **inexpensive** determination of every action." *Id.* (emphasis added). Allowing the Plaintiff multiple opportunities to "cure deficiencies" because of "repeated failure[s]" is not within the just, speedy and inexpensive requirement of Rule

1. *Id.* Therefore, this Court has permitted previous amendments, and deficiencies remain, so this Court should not permit further amendments. *Id.* Thus, the Court should grant this motion to dismiss and not allow any more opportunities to remedy deficient pleadings and put Defendants to the unfair task and expense of answering yet another pleading.

Furthermore, this Court cited in the Order Granting Leave to Amend the case of *Waters v. Young*, 100 F.3d 1437 (9th Cir. 1996). Therein, the *Waters* Court states, "As a general matter, this court has long sought to ensure that pro se litigants do not unwittingly fall victim to procedural requirements . . . ." *Waters v. Young*, 100 F.3d 1437, 1441 (9th Cir. 1996). Hence, in the case at hand, the Court understandably granted Plaintiffs an opportunity to amend their deficient complaint. However, the *Waters* Court emphasized in that same sentence that guiding pro se litigants should not go beyond "*some assistance* from the court." *Id.*

This Court has provided Plaintiffs with far more than merely "some assistance"—the Court told the Plaintiffs exactly what it needed to do to cure the deficiencies; yet deficiencies remain. *Id*. Here, the motion to dismiss should be granted because anymore assistance from the Court would exceed the assistance allowed. In fact, a close reading of *Waters* reveals that the Ninth Circuit discouraged too much "prompt[ing] by the district court." *Id.* at 1339. In *Waters*, for example, on two separate occasions, the district court prompted the Defendant to move for judgment as a matter of law pursuant to Rule 50. Although the assistance was provided to counsel in

this instance, the Circuit Court emphasized that court assistance in light of deficient legal representation, whether represented or pro se, should be limited.

V. Conclusion

For all of the foregoing reasons, the Defendants respectfully request that the Court grant this Motion and dismiss Plaintiffs' Second Amended Complaint in its entirety.

Respectfully submitted March 10, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2014, I served the attached document by First Class United States Mail, postage prepaid, and by electronic mail, upon the following who are not registered participants of the CM/ECF System:

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